

Notes

A Blow for Land-Use Planning?— The Takings Issue Re-examined

I. INTRODUCTION

The takings clause of the fifth amendment to the United States Constitution¹ continues to be the subject of spirited debate among courts, attorneys, legal commentators, and the public. The debate focuses on when a regulation enacted as a protection of a public interest exceeds the state's power to so act and results in a "taking" of property that demands just compensation.² The decisions of the United States Supreme Court both address and avoid this issue;³ the resulting body of law provides no bright line test to determine what a taking is,⁴ when a taking results,⁵ or what appropriate remedy lies.⁶

During the 1986 term, the Supreme Court heard three cases⁷ involving takings. Each dispute arose from a governmental regulation enacted to promote a public good. In one case the Court found the challenged regulation effected a taking;⁸ in one it did not;⁹ and in the third, the Court did not reach the takings question on the facts before it but held that a temporary regulatory taking equals a physical taking and requires compensation.¹⁰ These decisions may potentially exercise a profound effect on land-use planning practices and both local and national long-term development.

This Comment first identifies the tests and considerations utilized by the Court in confronting takings questions. It then examines these three recent takings

1. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

2. This proposition was first stated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("if regulation goes too far it will be recognized as a taking").

3. Joseph L. Sax's comments on takings jurisprudence remain appropriate today. He wrote that the "predominant characteristic of this area of the law is a welter of confusing and apparently incompatible results." Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). According to Sax, even the Supreme Court recognizes that it has failed to formulate a set rule for the recognition of when a regulation ends and a taking begins.

4. The Supreme Court has established and used various tests to determine when a taking occurs: appropriation of title, physical invasion, diminution of value, reduction of investment-backed expectations, noxious use, and no reasonable remaining economic use. See *infra* notes 24–29 and accompanying text.

5. The standard for finding a taking is that the "regulation must 'substantially advance' the 'legitimate state interest' sought to be achieved." *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 n.3 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). At times the takings standard has been confused with the due process standard, which requires merely a rational basis for the state's enactment of the regulation. See *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). See also *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2390 (1987) (Stevens, J., dissenting), in which Justice Stevens was the only Justice who felt the due process clause should protect property owners from "improperly motivated, unfairly conducted, or unnecessarily protracted governmental decision-making." *Id.* at 2399. Justices Blackmun and O'Connor did not join Part IV of Justice Stevens' dissent, which discussed the due process standard.

6. Remedies include striking down the regulation at issue, modifying it, and awarding monetary damages. Determination of monetary damages is a complex issue. Various methods of evaluating property interests are used, but no guidelines have been established. Difficult aspects of this problem are determining compensation when property value has increased as a result of the regulation and deciding at what point to begin the valuation process—at the moment the regulation goes into effect or at a later time when the regulation directly impinges the property owner's interest.

7. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987).

8. *Nollan*, 107 S. Ct. 3141.

9. *Keystone*, 107 S. Ct. 1232.

10. *First English*, 107 S. Ct. 2378.

decisions, attempts to determine what prompted the Court's findings, and places each decision within the Court's takings framework. Next, the individual decisions are reconciled to the extent possible and examined to see if a concise and rational takings analysis emerges. Finally, future implications of the cases upon the takings question are discussed.

II. TAKINGS TESTS

The fifth amendment takings clause provides the starting point for analysis of the takings issue. The Court's definition of a taking at any given moment in history reflects the prevailing economic climate and social concerns at that time.¹¹ The variation in application of the takings clause arises in part because the fifth amendment does not define a taking. It merely provides that compensation be paid for every taking of private property for public use. In determining the issue of a taking, the Court measures the regulation against a substantial and legitimate state interest.¹² The Court also considers the magnitude of the loss to the property owner and whether any value or use remains in the property. State interests involving public health and safety are more likely to be upheld than those that result merely in convenience for the general public at the expense of one private landowner. If the Court determines both that the regulation directly advances the asserted interest and no more reasonable means to achieve the desired end exists, no taking will be recognized. The question of when a regulation that advances a legitimate interest goes "too far,"¹³ however, has yet to be answered.

While every confiscation of property—through physical occupation or appropriation or through regulation, whether it be temporary or permanent—does not constitute a taking, the line between a valid police power regulation exercised for the public benefit and a taking requiring compensation remains unclear. This is so despite the various tests articulated by the Court to deal with the problem. None of the tests standing alone is determinative of a taking. Rather each is a factor to use in considering the controversy at issue. Time has proven the tests to be flexible enough to allow the Court to reach what it feels are correct decisions in view of the particular facts, circumstances, and parties before it.

The Court has frequently expressed its belief that each controversy must be examined individually.¹⁴ This ad hoc approach to individual disputes accounts for the varying and sometimes seemingly inconsistent outcomes as the Court struggles to reach fair decisions.

11. The Supreme Court generally left the interpretation of public use to the state courts. Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 761 (1985). See *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848) (condemnation by state court of bridge in furtherance of a public good without compensation upheld).

12. *Aguins v. Tiburon*, 447 U.S. 255, 260 (1980).

13. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

14. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("[T]his Court . . . has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (The Court "has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted."); *Pennsylvania Coal*, 260 U.S. at 416 ("[T]his is a question of degree—and therefore cannot be disposed of by general propositions.").

A. Direct Invasion or Physical Appropriation

The 1871 case of *Pumpelly v. Green Bay Co.*¹⁵ provided the Court with its first opportunity to examine the takings issue.¹⁶ The Court held that direct damages resulting from a permanent physical encroachment would be compensable.¹⁷ In a later decision, the Court clarified its holding in *Pumpelly* and specifically held that indirect damages would not be compensated.¹⁸ This test continues to be used today. It provided the basis for the Court's recognition of a compensable taking where a cable television box was permanently installed on an apartment building.¹⁹ The Court also found a direct physical occupation resulted where a property owner was prevented from using and enjoying the property by frequent aircraft overflights.²⁰

B. Matter of Degree Test

The Court articulated the seminal test for the determination of a taking in *Pennsylvania Coal Co. v. Mahon*.²¹ Justice Holmes proposed and applied the "matter of degree" test: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²²

The Court did not rely on any single factor to determine when a regulation goes "too far."²³ It enumerated several considerations, any one of which could produce a different outcome if the Court chose to emphasize it. These factors included diminution of value,²⁴ nuisance,²⁵ destruction of all value,²⁶ reciprocity of

15. 80 U.S. (13 Wall.) 166 (1871).

16. Private landowner brought suit to recover for damages to his property resulting from water overflow caused by a dam that was erected under authority of a state statute. *Id.* at 167. Defendant argued the erection and maintenance of the dam were state action; that any damage to the land was remote and consequential of the dam's existence; and that the land had not been appropriated. *Id.* at 176-77.

The state constitution contained a provision nearly identical to the fifth amendment of the United States Constitution: "the property of no person shall be taken for public use without just compensation therefor." *Id.* at 177 (quoting Wis. CONST. art. 1, sec. 13).

17. *Id.* at 181.

18. Seven years after *Pumpelly*, the Court held that indirect injuries were not compensable. *Transportation Co. v. Chicago*, 99 U.S. 635 (1878). In *Transportation Co.*, recovery for damages resulting from construction of a tunnel under a public street was sought; the damages consisted of rentals due to blockage of the access to plaintiff's dock and warehouses during construction and physical damage to the warehouse structure. The Court distinguished *Pumpelly* and found no damages owing because there was not a permanent "physical invasion of the real estate of the private owner . . ." *Id.* at 642.

19. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

20. *United States v. Causby*, 328 U.S. 256 (1946).

21. 260 U.S. 393 (1922).

22. *Id.* at 415.

23. *Id.* The phrase "too far" is used often in takings analysis.

24. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [S]ome values are enjoyed under an implied limitation." *Id.* at 412. Justice Holmes also stated that the limitation is determined by the "extent of the diminution" in value after considering all the facts and circumstances before the Court. *Id.*

25. Holmes referred to the law of nuisance in his discussion of the public interest and found that damage to individual structures did not constitute a public nuisance. *Id.* at 413. Nuisance is one theory used by the Court to avoid a compensable taking when the state, acting pursuant to its police power and out of a legitimate concern for public safety, regulates the location and operation of a nuisance.

26. Holmes found that the statute in question made it "commercially impracticable to mine certain coal . . . very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414.

advantage,²⁷ public purpose,²⁸ and nature of the governmental regulation.²⁹ Reciprocity of advantage, also known as the common burden of citizenship, refers to reciprocal benefits and burdens enjoyed and shared by all members of society.³⁰ This concept is used increasingly as an argument favoring public policy regulations promoting expansive interpretations of public good and safety.

The Court continues to use these factors to guide its examination of the facts before it.³¹ Reliance on one factor rather than another or the balancing of several factors reflects the Court's concern for the particular interest before it, whether it be public or private, and its efforts to keep governmental activity within constitutional boundaries.

C. Frustration of Investment-Backed Expectations

The evolution of the tests applied by the Court continued in *Penn Central Transportation Co. v. New York City*³² in which the Court again "balanced" several factors before determining the takings issue. The factors considered were: (1) the economic impact of the regulation, (2) the character of the government action, (3) the necessity of the restriction to the effectuation of a substantial public purpose, and (4) the possibility of an unduly harsh impact on the owner's use of his property.³³ Ultimately, *Penn Central* rested on economic concerns measured under both diminution of value and frustration of investment-backed expectations approaches. The Court focused on the value retained by the investor after the regulation's application and determined the property interest remained valuable and useful.³⁴

D. Valid Public Interest and Noxious Use

The nature of the public interest advanced by a regulation is not an articulated test, but it is frequently the basis for the Court's failure to find a taking. Public use, like taking, is not easily defined.³⁵ However, when a regulation advances what the

27. Holmes rejected safety concerns on the grounds that in this situation the statute regulating the coal mining companies' conduct did not secure "an average reciprocity of advantage that has been recognized as a justification of various laws." *Id.* at 415. Under this theory, individuals affected by the regulation may suffer directly from the regulation's provisions, but they still receive a benefit through both the regulation's positive effect on society as a whole and the advantage of living in this particular society.

28. Public interest often provides a basis for finding a police power enactment valid. Holmes found the public purpose of the statute to be "limited"; the "statute [does] not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.* at 414.

29. The nature of the government regulation is closely related to public purpose. The government must not use its power to benefit private interests at the expense of individual property owners. Justice Holmes felt this was clearly the case in *Pennsylvania Coal* where the individual property owners (including city governments) failed to exercise foresight in not acquiring the support estate when they purchased the surface estate. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

30. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

31. See *infra* note 37 for a list of cases in which the Court considered several factors in addressing the takings question. See also *Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Central*, 438 U.S. 104.

32. 438 U.S. 104 (1978).

33. *Id.* at 127.

34. *Id.* at 136-37.

35. One commentator's view is that "the Supreme Court's failure to establish an interpretative floor for 'public use' has emasculated the takings clause and resulted in a license for politically powerful private agents to take others'

Court agrees is a valid public purpose,³⁶ and the property interest "taken" constitutes a nuisance or noxious use, the Court is likely to find a valid exercise of the state's police power and determine that no compensation is necessary.³⁷ Takings arguments in the context of zoning cases often fail unless the challenged regulation is clearly arbitrary and unreasonable, under the theory that the state may constitutionally protect the public welfare by limiting certain activities that could be noxious in an inappropriate setting.³⁸

III. THE TAKINGS ISSUE AND THE 1986 TERM OF THE UNITED STATES SUPREME COURT

Current treatment of the takings issue both expands past precedent and limits it as the Court struggles to propound correct decisions in each case it considers. While the range of results may be appropriate to the individual litigants, the varying results make it difficult to predict what the Court will find to be a taking³⁹ and when that taking will be compensable. Traditionally, a physical taking of private property for a public use entitled the landowner to monetary compensation for damages. The finding of a regulatory "taking," by contrast, resulted in invalidation of the regulation.⁴⁰

A. *Recent Applications of Takings Analysis by the Supreme Court*

Three cases heard and decided by the Supreme Court during the 1986 term address aspects of the takings issue. These decisions add new dimension and controversy to the issue.

private property at prices below those available by open and voluntary exchange on the market." *Bender*, *supra* note 11, at 761 n.89.

36. See generally *Bender*, *supra* note 11.

37. The Court failed to find a taking and justified the restriction of property use on the noxious use theory in the following cases: *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (rock quarry excavation came within city limits); *Miller v. Schoene*, 276 U.S. 272 (1928) (infectious disease spread by red cedar trees would destroy economically important apple orchards); *Hadachek v. Los Angeles*, 239 U.S. 394 (1915) (brick factory closed down when residential area built up around it); *Mugler v. Kansas*, 123 U.S. 623 (1887) (brewery closed by regulation prohibiting manufacture of intoxicating beverages). Each of these findings of a noxious use directly related to the importance placed on the restricted activity or property by society's current economic and moral concerns.

38. This approach also generally holds that some value remains to the complaining property owner. The various factors obviously are interrelated. Depending upon the facts, the Court could find a taking in a zoning case despite an admitted and important public interest where the use of the property was destroyed totally and no value remained to the landowner, or where the public interest was not advanced by the regulation at issue. The concept of public purpose has expanded over the years, beginning with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), which was grounded in nuisance and allowed the exclusion of industry from certain areas within the village, continuing through *Berman v. Parker*, 348 U.S. 26 (1954), which recognized preservation of quality of life through the character and aesthetics of an urban area, and culminating in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which upheld a public interest in defining family and incorporating that definition into the zoning code to determine the composition of groups living in a neighborhood.

39. The positions of the Justices composing the Court during the 1986 term on these decisions illustrate this dilemma and explain in part why the outcomes varied: (1) Justices Stevens and Blackmun found no taking in any of the cases under consideration; (2) Chief Justice Rehnquist and Justices Powell and Scalia found a taking in each instance; and (3) Justices Brennan, Marshall, O'Connor, and White voted differently in each case. The presence of Justice Kennedy on the Court may affect future takings decisions; if he favors the Court's stand as reflected by the majority votes, his vote would strengthen the pro-takings faction of the Court.

40. *Morris*, *Supreme Court Land Use Decisions Uncertain in Defining a 'Taking,'* Nat'l L. Rev., Sept. 7, 1987, at 20, col. 2.

1. *Keystone Bituminous Coal Association v. DeBenedictis*

In *Keystone Bituminous Coal Association v. DeBenedictis*,⁴¹ the Court upheld a challenged state statute enacted to promote an important public concern and found that no taking resulted where the coal mining companies were unable to mine certain coal in mineral estates they owned.

The Pennsylvania legislature enacted the Bituminous Mine Subsidence and Land Conservation Act⁴² (Subsidence Act) in 1966 to protect the “public interest in safety, land conservation, preservation of affected municipalities’ tax bases, and land development in the Commonwealth.”⁴³ Under the Subsidence Act, a comprehensive program was established to “prevent or minimize subsidence and to regulate its consequences.”⁴⁴ Section 4 of the Subsidence Act prohibited subsurface mining beneath three classifications of property—“public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries.”⁴⁵ Beneath these areas, the general rule required fifty percent of the coal to be left intact to avoid subsidence of the surface.⁴⁶

The coal mining companies brought suit challenging the constitutionality of the Subsidence Act, which they claimed took their property by destroying all value to them.⁴⁷ Both the district court⁴⁸ and the court of appeals⁴⁹ found sufficient public purpose to sustain the statute as a valid police power measure.

In reaching its decision, the Court first looked at the purpose of the Subsidence Act. It found that the state could exercise its police power to protect the public from the dangerous conditions associated with surface subsidence in the designated areas.⁵⁰ Using this approach, the Court considered the nature of subsurface mining and characterized its effects on the surface as the by-product of a nuisance. Traditional takings analysis accords great discretion to the state when regulating a noxious use that impairs public safety. The Court thus rejected the coal mining companies’ claim that the state exceeded its authority in enacting the statute.⁵¹

The Court then considered the coal mining companies’ claim that their interest in the property affected by the regulation was destroyed. Specifically, they would be unable to mine twenty-seven million tons of coal.⁵² The Court reasoned that the value of the entire estate in property held by the coal companies would be minimally affected by their inability to mine the coal in the proscribed areas.⁵³ The twenty-seven million tons of coal could not be considered a separate estate from the remainder of

41. 107 S. Ct. 1232 (1987).

42. PA. STAT. ANN. tit. 52, § 1406 (Purdon Supp. 1988).

43. *Keystone*, 107 S. Ct. at 1236.

44. *Id.* at 1237.

45. *Id.*

46. *Id.* at 1238.

47. *Id.* at 1238–39.

48. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 581 F. Supp. 511 (W.D. Pa. 1984).

49. *Keystone Bituminous Coal Ass’n v. Duncan*, 771 F.2d 707 (3d Cir. 1985).

50. *Keystone*, 107 S. Ct. at 1242–46.

51. *Id.* at 1245–46.

52. *Id.* at 1249.

53. *Id.*

the subsurface coal.⁵⁴ Consequently, the regulation did not deprive the property owners of a reasonable return on their total property, nor did it deprive them of all use of their property. The coal mining companies did not produce any evidence that they would be unable to operate their businesses profitably under the application of the statute.⁵⁵

In reaching its decision, the Court had to re-examine its 1922 decision in *Pennsylvania Coal Co. v. Mahon*.⁵⁶ *Pennsylvania Coal* dealt with a nearly identical state statute (the Kohler Act) prohibiting subsurface mining beneath certain public areas. It too was enacted for the public benefit and safety. However, Justice Holmes, writing for the majority, dismissed the public safety concern and focused instead on the contractual relationship between two private parties⁵⁷ and the effect of the statute on the private obligation.

Without overruling *Pennsylvania Coal*, the Court in a five-to-four decision⁵⁸ ruled against the coal mining companies. The majority distinguished the 1966 Subsidence Act from the Kohler Act. Specifically, the Subsidence Act applied to all property owners. Under the Kohler Act, surface owners who also owned the contiguous support and mineral estates were not bound by the terms of the statute. The Subsidence Act required compliance by *all* surface owners unless the Pennsylvania Department of Environmental Resources consented.⁵⁹ This focus re-emphasized the public safety and welfare concerns underlying the Subsidence Act.

The Court held that the regulation served a legitimate state interest of substantial importance to the health, safety, and welfare of the state citizens.⁶⁰ The property owners retained the ability to derive a substantial profit from their total investment despite the regulation's prohibition of coal mining in certain locations, and the Court accordingly found the Subsidence Act a valid exercise of the state's police power.⁶¹

The dissenting Justices argued that the differences between the two Acts "verge on the trivial."⁶² They found the public purpose behind the Subsidence Act no more compelling than that of the Kohler Act, which Justice Holmes struck down.⁶³ They further found that the nuisance basis of the majority's opinion was ill-grounded because the Act dealt with much more than nuisance control.⁶⁴ Finally, the dissent rejected the majority's view of the estate in coal as an entirety and instead focused on

54. *Id.* Interestingly, the Court completely ignored Pennsylvania's state law recognition of the subjacent support as a separate estate in land.

55. *Id.* at 1250-51.

56. 260 U.S. 393 (1922).

57. *Id.* at 415. "So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* at 416. In *Pennsylvania Coal*, both parties were private rather than governmental entities. The state participated as an amicus of the defendant. In contrast, the state was the defendant in the *Keystone* litigation.

58. Justices Blackmun, Brennan, Marshall, Stevens, and White voted to uphold the statute as a valid police power measure. Chief Justice Rehnquist and Justices Powell, O'Connor, and Scalia felt the statute effected a taking under the reasoning of *Pennsylvania Coal*.

59. *Keystone*, 107 S. Ct. at 1242-43.

60. *Id.* at 1246.

61. *Id.* at 1248.

62. *Id.* at 1254 (Rehnquist, C.J., dissenting).

63. *Id.* at 1255 (Rehnquist, C.J., dissenting).

64. *Id.* at 1257 (Rehnquist, C.J., dissenting).

the particular coal affected by the regulation, much as Justice Holmes did in *Pennsylvania Coal*.⁶⁵ Under this approach, the value of the property was totally destroyed, and, lacking a valid purpose, the statute worked a taking that required compensation.

Under *Keystone*, therefore, the Court held that before a compensable taking will be recognized the restricted property owner must prove the property affected by the regulation is incapable of producing any profit *and* the regulation does not protect a legitimate, general, and substantial "public interest in the health, the environment, and the fiscal integrity of the area."⁶⁶ The property considered will be a totality of property interests and not just the effects of the regulation on one strand in the bundle of property rights. In this respect, the majority adopted Justice Brandeis' definition of property set forth in his dissenting opinion to *Pennsylvania Coal*.⁶⁷ In light of the presumption of legislative validity accorded state statutes by the Court, unless the regulation were clearly arbitrary and unreasonable, the persons challenging the regulation would have great difficulty overturning it.

The *Keystone* dissent claimed that the majority had in effect overruled *Pennsylvania Coal*.⁶⁸ The majority's distinction may seem nonexistent. However, considering the focus upon private contract rights in *Pennsylvania Coal*, the status of the parties to each lawsuit, and the provisions of the statutes themselves, the *Keystone* majority's fine distinction holds. *Pennsylvania Coal*, after all, does stand for the proposition that when a regulation goes "too far," a taking will be found. That proposition remains valid today. Ultimate determinations depend upon its application to the specific facts before the courts.

It is difficult to project the effect of this decision when it is applied to a situation where the landowner's use and enjoyment of the property are totally destroyed and the legislation that effected the destruction advances a legitimate state interest. Underlying the Court's decision in *Keystone*, however, coupled with traditional takings analysis, are the various factors the Court considers in determining a takings question. A primary consideration is the use to which the property is put and the nature of that use in relation to the surrounding neighborhood. A nuisance may be regulated under the state's police power with less scrutiny than a non-nuisance. Although the Court has "never applied the nuisance exception to allow complete extinction of the value of a parcel of property,"⁶⁹ it has sustained regulations that significantly reduce the value of property.⁷⁰ In a situation where all use and value of the property are destroyed by the challenged regulation, the nature of the regulation would be scrutinized. When a regulation advances an interest under the state's safety or defense powers, it will probably be upheld, while a regulation that does not have such a strong basis will undoubtedly be struck down. In the past, the Court has

65. *Id.* at 1258-60 (Rehnquist, C.J., dissenting).

66. *Id.* at 1243.

67. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416-22 (1922) (Brandeis, J., dissenting).

68. *Keystone*, 107 S. Ct. at 1253-54 (Rehnquist, C.J., dissenting).

69. *Id.* at 1257 (Rehnquist, C.J., dissenting).

70. See *supra* note 37 for a list of cases in which the Court found no taking effected by the regulation, but the resulting economic loss to the individual property owners was great.

strained to find some value and use remaining to the property owner.⁷¹ However, following the Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*,⁷² which recognized that a temporary regulatory taking requires compensation, it remains to be seen how courts will interpret and apply that holding.

A major distinction between the *Keystone* majority and dissenting opinions is the definition of property used by each. The majority adopted Brandeis' approach from *Pennsylvania Coal* that considered the totality of the property interest and encompassed air, surface, and subsurface mineral and support estates into one estate.⁷³ The dissent, in contrast, considered each unit of property within the owner's total holding—the separate air, surface, and support estates, or a portion of any of them—a distinct subject for takings analysis. By considering all of the coal owned by the coal mining companies, the Court avoided the question of total destruction of property value. The nuisance characteristic of the regulated use further strengthened the Court's failure to find a taking in *Keystone*.

2. First English Evangelical Lutheran Church v. County of Los Angeles

In *First English Evangelical Lutheran Church v. County of Los Angeles*,⁷⁴ the Court held that a property owner is entitled to compensation for a temporary regulatory taking that deprives the owner of all use of the property for the period between the enactment of the regulation and the determination that it effects a taking under the fifth amendment.⁷⁵ A temporary taking that results in the property owner's inability to use the property does not differ from a permanent physical taking.⁷⁶

The First English Evangelical Lutheran Church of Glendale (Church) owned a twenty-one acre parcel of land located in the Angeles National Forest. Several buildings, which were used as a camp for handicapped children, were located on the property.⁷⁷ In 1978, the buildings were destroyed by a flood. Soon thereafter, the County of Los Angeles designated the Mill Creek Canyon area of the Angeles National Forest, which included the land upon which the camp was located, as a flood protection area and enacted an interim ordinance prohibiting any repair or construction of buildings within this area. The county determined the measure was "required for the immediate preservation of the public health and safety. . . ."⁷⁸

The Church sued soon after the designation and passage of the accompanying ordinance. It sought a recovery under inverse condemnation because the ordinance deprived it of all use of the property.⁷⁹ The California Superior Court rejected the Church's claim on the ground that the proper remedy for the claim was a declaratory

71. See *supra* note 37.

72. 107 S. Ct. 2378 (1987).

73. This approach was also followed in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

74. 107 S. Ct. 2378 (1987).

75. *Id.* at 2381.

76. *Id.* at 2388.

77. *Id.* at 2381.

78. *Id.* at 2382 (citation omitted).

79. *Id.*

judgment. Money damages would only be appropriate if the government continued the regulation as enacted. The California Court of Appeals affirmed, and the Supreme Court of California denied review.⁸⁰

The United States Supreme Court did not address the issue of whether the regulation in question did in fact deprive the Church of all use of and value in the property regulated.⁸¹ It left that question for the state court to decide on remand. The Court instead focused on the question of "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings."⁸²

The Court began by examining the text of the fifth amendment and considering its rationale. It recognized that the government may appropriate property within certain limits; the fifth amendment is "designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."⁸³

The Court turned its analysis to prior decisions in which it observed that damages were recoverable for the period of time the property was affected by the regulation prior to its abandonment.⁸⁴ It then held that "[i]nvalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."⁸⁵

The three dissenting Justices found four "flaws" in the majority's analysis.⁸⁶ First, the Church's complaint did not allege an unconstitutional taking; it merely sought damages and did not challenge the validity of the statute.⁸⁷ Second, the majority misinterpreted precedent by confusing regulatory takings and physical takings.⁸⁸ Third, the state may determine the appropriate procedure for awarding damages and invalidating unconstitutional statutes; at the time of the decision, California had not decided unilaterally that monetary damages may never be awarded.⁸⁹ Fourth, the due process clause, and not the takings clause, is the "primary constraint on the use of unfair and dilatory procedures in the land-use area."⁹⁰

The dissenting Justices did not reject totally the suggestion that a regulation could require compensation for a temporary deprivation of the owner's use of his property.⁹¹ They did, however, list more demanding qualifications for a deprivation than did the majority:

80. *Id.* at 2382-83.

81. *Id.* at 2384-85.

82. *Id.* at 2385.

83. *Id.* at 2386 (emphasis in original).

84. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Compensation was required in these World War II cases where the government temporarily appropriated the property for its own use.

85. *First English*, 107 S. Ct. at 2388.

86. *Id.* at 2390. Justice Stevens wrote the dissenting opinion and was joined by Justices Blackmun and O'Connor as to two of its four sections.

87. *Id.* at 2390-93 (Stevens, J., dissenting). See also *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (statute not subject to attack except in proceedings seeking damages through inverse condemnation).

88. *First English*, 107 S. Ct. at 2393-96 (Stevens, J., dissenting).

89. *Id.* at 2396-98 (Stevens, J., dissenting).

90. *Id.* at 2390, 2398-400 (Stevens, J., dissenting).

91. *Id.* at 2393 (Stevens, J., dissenting).

[T]he restriction on the use of the property would not only have to be a substantial one, but it would have to remain in effect for a significant percentage of the property's useful life. . . . [A]n application of our test for regulatory takings would obviously require an inquiry into the duration of the restriction, as well as its scope and severity.⁹²

On remand, the California court must determine if there is a taking; if it finds a taking, compensation must be paid. The state may still present convincing evidence that the regulation is a reasonable, or perhaps the only, means of promoting public health, safety, and welfare and thereby avoid the imposition of damages.⁹³

The *First English* Court recognized for the first time that a compensable taking may result from a temporary deprivation of property rights through regulation. Under this interpretation, money damages are available if a court determines a property owner has been deprived of substantially all value and use of the property as a result of a governmental regulation. Prior to *First English*, the invalidation of the statute served as the sole remedy for such a "taking." It was felt that repeal of the offensive regulation usually would "mitigate the overall effect of the regulation so substantially that the slight diminution in value that the regulation caused while in effect [could not] be classified as a taking of property."⁹⁴

The Court's recognition that temporary regulatory takings are compensable appears to be a logical extension of traditional takings law. Yet the Court's holding that a temporary regulatory taking cannot be cured by invalidation or modification of the regulation effecting the taking presents potentially difficult problems for local administrative agencies and courts. The principal problem is the chilling effect this decision may have on certain land use regulations and policies adopted and followed by local governments. Another problem is the valuation of the affected property right—what method should be used and when should valuation begin in determining what compensation is due under the fifth amendment.

As the dissent recognized, while in most cases invalidation of the regulation will cure the minimal economic effects of the regulation on the property, situations could arise in which value would be severely affected by the regulation.⁹⁵ The majority provides no guidelines for measuring the lost value during the pendency of the regulation. The dissent proposes consideration of three factors—"depth, width and length."⁹⁶ Depth is the extent of the regulation's effect on the owner's use of the property; width is the amount of property that falls within the regulation; and length is the duration of the regulation.⁹⁷

The recognition that the just compensation clause requires compensation for temporary regulatory takings is a new development in takings jurisprudence. Only in extreme cases, however, does it open the door for extensive and expensive litigation against local governments. In most cases, the standard for takings applied in the past will be appropriate. As long as a rational basis exists for the regulation enacted by the

92. *Id.* at 2394 (Stevens, J., dissenting).

93. *Id.* at 2384–85.

94. *Id.* at 2393 (Stevens, J., dissenting).

95. *Id.*

96. *Id.* at 2394 (Stevens, J., dissenting).

97. *Id.*

state and the regulation substantially advances the state interest, it will stand. The new approach allows compensation for regulations that clearly have no rational basis and destroy the property owner's use of and value in the land. However, the potential for chilling land-use decisions by local governments is very real. Depending upon how courts apply the *First English* holding, and whether they require that the regulation both unreasonably deprives the owner of the use of the property and exceeds the state's authority under its police power, local planning boards may be extremely reluctant to enact creative planning measures to deal with the community's growth and development.

3. Nollan v. California Coastal Commission

In *Nollan v. California Coastal Commission*,⁹⁸ the Court determined that the statute enacted by the government requiring the grant of a public easement across privately owned property as a condition for the issuance of a building permit effected a taking of private property within the meaning of the fifth amendment.

Mr. and Mrs. Nollan purchased a beachfront lot after leasing it for many years.⁹⁹ The sellers conditioned the sale of the property on the Nollans' destruction and replacement of the existing bungalow, which was in a state of disrepair.¹⁰⁰ The Nollans planned to demolish the structure and build a new home, which conformed to existing homes in the neighborhood, on the same site.¹⁰¹ The California Coastal Commission granted the necessary building permit,¹⁰² but, pursuant to its interpretation of the California Coastal Act, conditioned the permit upon the Nollans' grant of a public easement across their beach property.¹⁰³

The Nollans protested the imposition of the restriction on the ground that the condition was proper only insofar as the Commission proved an adverse impact by their development on public access to the beach.¹⁰⁴ The trial court agreed with the Nollans.¹⁰⁵ The Commission appealed the decision and the California Court of

98. 107 S. Ct. 3141 (1987).

99. *Id.* at 3143.

100. *Id.*

101. *Id.*

102. Permits are required for development under California Public Resources Code §§ 30106, 30212, and 30600.

103. Traditionally, public access across beaches is unlimited below the mean high tide line. The beach above the mean high tide line remains private beach. The beach areas of the Nollans' property are separated from the rest of the lot by an eight-foot high concrete seawall. *Nollan*, 107 S. Ct. at 3143. At some times of the year, the ocean extends over the entire beach area to the seawall.

104. *Id.* at 3143. The Nollans originally sought an administrative mandamus in the Ventura County Superior Court in protest of a ruling against their appeal to the California Coastal Commission. The trial court found for the Nollans and remanded to the Commission for further consideration on the issue of the development's impact on the public's access to the beach. The Commission reaffirmed its position. The Nollans filed a second administrative mandamus action with the trial court, and it again found for the Nollans. On appeal by the Commission, the California Court of Appeals ruled in its favor. From this ruling the Nollans appealed directly to the United States Supreme Court on the constitutional issue of a fifth amendment taking.

105. *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 723, 223 Cal. Rptr. 28, 30-31 (1986).

California Public Resources Code § 30212 addresses the question of public access in development projects. Section 30212(b) sets forth a list of development-type activities not included in new development for purposes of permit requirements. Subsection (5) defines exempted development activity as: "Any repair or maintenance activity . . . unless the commission determines that the activity will have an adverse impact on lateral public access along the beach" (emphasis added).

Appeals reversed. It broadly interpreted the provisions of the California Coastal Act dealing with new construction and, in so doing, held that:

so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional.¹⁰⁶

The Nollans appealed from the California Court of Appeals' decision directly to the United States Supreme Court on the constitutional question of whether the California Coastal Commission's regulation constituted a taking in violation of the fifth amendment.¹⁰⁷ The Supreme Court found a taking.¹⁰⁸

In an opinion joined by four other Justices,¹⁰⁹ Justice Scalia stated the general rule that a clear taking would occur if the state simply required the grant of a permanent easement for public access across the Nollans' beachfront absent a clear nexus between the regulatory requirement and the public need.¹¹⁰ The focus then turned to the concept of a regulatory taking. Justice Scalia found that a "'permanent physical occupation' of the property, by the government itself or by others"¹¹¹ resulted from the issuance of a development permit conditioned upon the grant of a permanent easement to the public.

The Court reaffirmed its position originally articulated in *Pennsylvania Coal* that a regulation enacted under the state police power must not go "too far." Looking first at the fifth amendment to the United States Constitution, the Court stated that "one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of . . . [property] interests, so long as it pays for them."¹¹² The Court then stated that "requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment"¹¹³ No consideration was given to the California Constitution because the appeal to the United States Supreme Court rested on federal constitutional grounds.¹¹⁴

In finding that the regulation effected a taking, the Court relied upon the theory set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*¹¹⁵ and *Kaiser Aetna v. United States*,¹¹⁶ which both recognized a taking based upon the slightest permanent physical invasion theory. The *Nollan* Court drew upon these prior decisions for the proposition that the right to exclude others is "one of the most essential sticks in the

106. *Nollan*, 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30-31.

107. *Nollan*, 107 S. Ct. at 3145.

108. *Id.*

109. Chief Justice Rehnquist and Justices White, Powell, and O'Connor joined Justice Scalia to form the majority.

110. *Nollan*, 107 S. Ct. at 3145.

111. *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9 (1982)).

112. *Id.*

113. *Id.* at 3146.

114. Nevertheless, the Court discussed the words in the California Constitution granting the public right of access to the beach and found that a narrow reading of the appropriate section failed to support a state constitutional right of access to the water across private property from the roadway. The California Coastal Commission wanted an easement across the Nollans' private beach property between two public beaches. *Id.* at 3145.

115. 458 U.S. 419 (1982).

116. 444 U.S. 164 (1979).

bundle of rights that are commonly characterized as property.”¹¹⁷ The Court regarded the right to exclude the public from a permanent easement for a beach pathway as so important that it could not be taken from the Nollans without compensation,¹¹⁸ and it found that the easement amounted to a permanent physical occupation of property in the same way the cable television box permanently “occupied” Mrs. Loretto’s apartment building. The easement equaled a taking as found uniformly by the Court on previous occasions “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”¹¹⁹

The *Nollan* Court also considered another line of cases in which the Court had previously recognized that regulation of land use does not equal a taking if the regulation “substantially advance[s] legitimate state interests.”¹²⁰ Takings may also be denied when an owner retains an “economically viable use” of the property.¹²¹ However, these cases did not control in *Nollan*; Justice Scalia found that the regulation “utterly fail[ed] to further the end”¹²² it sought to achieve and, therefore, could not withstand the constitutional challenge.

The Court upheld the use of exactions and restrictions for development with the proviso that “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an ‘out-and-out plan of extortion.’”¹²³ In the Nollans’ circumstances, however, the requisite relation between the restriction and the proposed use was lacking, and thus the restriction worked a taking on the restricted property owner.¹²⁴

The Court rejected the argument of the California Coastal Commission that the restriction was proper on the basis of a public constitutional right of access to the beach.¹²⁵ The Commission failed to establish to the Court’s satisfaction how the public access to the beach was hampered by the building of a three bedroom dwelling on the beachfront site of a previous bungalow. From the evidence presented, the Court found the use of the site remained the same after the new development¹²⁶ and the public need was not changed by the development.¹²⁷ Therefore, absent any compelling evidence presented by the Commission, the regulation worked a taking; if the Commission wanted the easement for public access to the beach across private property, it would have to proceed under eminent domain.

117. *Id.* at 176.

118. *Nollan*, 107 S. Ct. at 3150.

119. *Id.* at 3145 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982)).

120. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

121. *Agins*, 447 U.S. at 260.

122. *Nollan*, 107 S. Ct. at 3148.

123. *Id.* (citations omitted).

124. *Id.*

125. *Id.* at 3148–49.

126. *Id.* at 3149. Exactly what is meant by “new” development is unclear. The Commission acts on the presumption that any development is development requiring a permit within the meaning of the California Coastal Act. The language of the Act permits such a construction. Yet the state court cases reveal the unfairness that results from this policy. The application of the standards to new large-scale projects is much more palatable than to an individual property owner merely seeking to improve or even save property. *See generally* Tabor, *The California Coastal Commission and Regulatory Takings*, 17 PAC. L.J. 863 (1986).

127. *Nollan*, 107 S. Ct. at 3149.

The four dissenting Justices¹²⁸ argued that the easement requirement was a mere restriction of the property's use¹²⁹ and not a permanent physical invasion of the Nollans' property. Furthermore, the dissenting Justices found that the regulation advanced a valid government interest, and that the Court should not interfere with either the state's determination of public welfare concerns or its enactment of regulations furthering those concerns under its police power.¹³⁰ The dissent used an equal protection standard—as long as the state could rationally have decided the regulation might further the interest at issue and its action could not be proven unreasonable and arbitrary, the regulation should be upheld as a valid exercise of the state's police power.¹³¹ The majority responded to this position in a footnote elaborating the discussion of the standard applied: "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, . . . not that 'the State "could rationally have decided" the measure adopted might achieve the State's objective.'"¹³²

The dissenting Justices also noted that the Nollans' property value was not diminished to an unreasonable degree by the required easement.¹³³ In fact, the value of the property increased directly as a result of the newly constructed dwelling. The dissent found further support for the regulation in the reciprocity of advantage and the investment-backed expectations theories.¹³⁴ The Nollans received benefits of the regulation as both private citizens and members of the public because they too enjoyed the right to walk along the beach on either side of their property.¹³⁵ Because the public access over the beach had been exercised by the public for years prior to the Nollans' purchase of the property and the Nollans had prior notice of the permit condition for new development, they could not claim that their investment-backed expectations had been thwarted, nor that they had the expectation of a right to exclude the public.¹³⁶

B. *Can Keystone, First English, and Nollan be Reconciled?*

Of these three decisions, *Keystone* and *Nollan* are facially inconsistent. In *Keystone*, the Court found that the regulation advanced a legitimate public safety concern and deferred to the state legislature absent a showing by the coal mining companies that they would be unable to derive a reasonable return from their property. In contrast, the *Nollan* Court did not find a reasonable relationship between the asserted state interest and the regulation as it impacted on the Nollans' property, despite the long-standing state goal in California to achieve public access to the beach along the entire coastline. The Court held that the state must produce convincing evidence of the validity of the regulation. *First English* accords with *Keystone* in that a legitimate public safety purpose may save the challenged county ordinance on remand.

128. Justices Brennan, Marshall, Blackmun, and Stevens dissented.

129. *Nollan*, 107 S. Ct. at 3152–53, 3154 n.3 (Brennan, J., dissenting).

130. *Id.* at 3150–62 (Brennan, J., dissenting).

131. *Id.* at 3151–54 (Brennan, J., dissenting).

132. *Id.* at 3147 n.3 (citations omitted) (emphasis in original).

133. *Id.* at 3158 (Brennan, J., dissenting).

134. *Id.*

135. *Id.*

136. *Id.* at 3158–60 (Brennan, J., dissenting).

There may be an underlying consistency, however, to the decisions. In each suit, a regulation enacted by the state pursuant to its police power to protect the public health, safety, and welfare was challenged. Two of these regulations, the Subsidence Act in *Keystone* and the California Coastal Act in *Nollan*, were state-wide regulations. The regulation challenged in *First English* was a county ordinance.

The *Keystone* and *Nollan* statutes both addressed concerns that affected a large portion of the state population. The purpose underlying the Subsidence Act in *Keystone* was protection of state citizens from great potential danger and harm. Although other concerns were articulated in the Subsidence Act,¹³⁷ its primary goal was to protect the public in particular locations from the dangerous conditions associated with subsurface coal mining.

In contrast, the provision of the California Coastal Act¹³⁸ at issue in *Nollan* did not promote public safety. Rather, it furthered the state's interest in environmental conservation and its desire to provide all state citizens with access to the ocean shoreline for their enjoyment. The Court recognized that the Coastal Act promoted a legitimate state concern. However, because this restriction resulted in a permanent physical invasion that was not sufficiently related to a valid state interest, the exercise of the eminent domain power by the state was the appropriate method by which it could acquire the desired property interest.¹³⁹

The county ordinance at issue in *First English* was enacted as a measure to protect the public from the dangerous conditions in a serious flood hazard area. In this instance, the Court did not consider the nature of the regulation. It merely held that a regulation may result in a temporary taking for which compensation must be paid when a property owner is deprived of substantially all use of the property for a given period of time. With this in mind, the Court did not disregard the public purpose of the county's flood protection ordinance.

When considering all three of the challenged regulations, the strength of the public purpose and its direct relationship to the terms of the regulation remain strong considerations in favor of validity. In *Keystone*, the Court found that the public purpose of avoiding a dangerous condition, which could affect a large portion of the population, was a valid exercise of police power. Together with the avoidance of danger to the public, the property owners retained valuable interests in the property regulated and failed to show that they were unable to derive any profit from their mining operations.¹⁴⁰ In *Nollan*, the Court found the public purpose of providing the

137. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1236 (1987) (land conservation, preservation of affected municipalities' tax bases, and land development).

138. California Public Resources Code § 30001.5(c) sets forth one of the goals of the California Coastal Commission: "Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners." Further, California Public Resources Code § 30211 states that "[d]evelopment shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization. . . ." The goals of the Coastal Commission are implemented through regulations enacted with the California Coastal Act, which include requirements for coastal development permits for any development in the coastal zone. CAL. PUB. RES. CODE § 30600 (West 1986).

139. *Nollan*, 107 S. Ct. at 3150.

140. Perhaps if proof had been offered that mining could not be pursued profitably, as it had been convincingly

population with access to the beach was not one compelling enforcement of the statute under the state's police power. In *First English*, the Court left the issue of the validity of the interim ordinance and its asserted public purpose for the lower court's determination on remand.

In actuality, these decisions are not inconsistent. The Court's concern with a valid purpose regulated through appropriate means is clear throughout each opinion. Although all three were close decisions, the majority in each looks to the underlying basis of the regulation and then considers the effect of the regulation. The *First English* decision carries the process one step further and equates a temporary regulatory taking with a physical taking where the owner is deprived of substantially all use of the property, a step not as radical as it appears in light of the dissenting opinion.¹⁴¹

C. *A New Definition or Direction for Takings Analysis?*

These decisions do not appear to present a new direction for takings analysis; nor do they result in a new test for determining when a taking is effected. They draw upon past tests and concerns enunciated by the Court. The Court focused strongly on the economic potential retained by the property owners, evidencing a concern that the property owner not be deprived totally of all use and value in the property. The Court also focused on the relationship between the purpose underlying the regulation and the terms of the regulation to effect that purpose. *Nollan* adds another narrow application to the physical invasion test. While the *Loretto* Court found a taking from the placement of a small physical object on an apartment building, the *Nollan* Court held that an easement for the passage of the public across private property was a "permanent physical occupation,"¹⁴² which effected a taking and required compensation to the property owner. More importantly, the Court re-emphasized the requirement that there be a rational relationship between a legitimate state interest and the restriction imposed by the regulation.

The new dimension added by *First English* is that a temporary regulatory taking is now possible. This holding expands previous decisions that recognized compensable takings resulting from temporary physical takings.

IV. FUTURE IMPLICATIONS OF THE DECISIONS

A. *Concerns*

Legal commentators soundly criticize the "crazy-quilt pattern"¹⁴³ resulting from the Court's decisions on the takings issue.¹⁴⁴ They decry the uncertainty found

argued in *Pennsylvania Coal*, the statute would have been held to effect a taking for which compensation must be paid, or under which the statute must be overturned.

141. The Court held generally that a temporary regulatory taking will be compensated; it did not hold that this regulation was invalid. The regulation itself must be examined considering the totality of takings factors to determine if it effects a taking.

142. *Nollan*, 107 S. Ct. at 3145 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982)).

143. Dunham, Griggs v. Allegheny County, In *Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 63.

144. See generally Bender, *supra* note 11; Costanis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Epstein, *The Public Purpose Limitation on the Power of Eminent Domain*:

in the Court's takings decisions, which makes it impossible to guess when a taking will be found and when it will not.¹⁴⁵ These concerns remain after *Keystone*, *First English*, and *Nollan*. The Court adhered to its earlier position that the takings area defies a set formula and once more did not suggest any provisions that make the determination of a taking more certain or the valuation of the property loss more readily calculable.

Government agencies have other concerns resulting directly from these decisions—fears that they will be inundated with expensive time-consuming litigation¹⁴⁶ and that creative land-use planning necessary to deal with rapid population growth and development will be chilled. Whether or not these decisions will exercise a chilling effect on land-use planning awaits the courts' applications of the holdings to specific facts. Both *Nollan* and *First English*, however, present courts with Supreme Court decisions that could substantially curtail planning practices at every level of government.¹⁴⁷ Of these decisions, the *First English* Court's recognition of a compensable temporary regulatory taking could have the most devastating consequence on the planning process. If courts do find regulations that deprive an owner of the property's use for a specified period of time effect a compensable taking, even when the regulation advances a legitimate public interest, planners will be hesitant to propose growth moratoria or to zone areas for the most highly restricted use at the exclusion of other uses.

Nollan raises questions about the appropriateness of exactions and dedication requirements in connection with development. Exactions and dedications have become a means whereby communities are able to absorb development because developers assist in the financing of infrastructure improvements and other community requirements, which usually have been necessitated by the development.¹⁴⁸ Justice Scalia admitted in *Nollan* that had he been able to find a direct connection between the Coastal Commission's permit requirement and the asserted state interest in maintaining a barrier-free access to the ocean, he would have allowed the

A *Constitutional Liberty Under Attack*, 4 PACE L. REV. 231 (1984); Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981); Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981); Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation"*, 80 HARV. L. REV. 1165 (1967); Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*, 18 URB. LAW. 635 (1986); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Wright, *Exclusionary Land Use Controls & the Taking Issue*, 8 HASTINGS CONST. L.Q. 545 (1981).

145. Joseph Sax's comments are representative of the criticism: "[T]he Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem." Sax, *supra* note 3, at 46.

146. See generally Morris, *supra* note 40; Callies, *Takings Clause—Take Three*, 73 A.B.A. J. 48 (Nov. 1, 1987).

147. See generally Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988); Stroud, *Legal Considerations of Development Impact Fees*, 54 J. AM. PLAN. A. 29 (1988).

148. The rational nexus test is the mainstream method for analyzing the appropriateness of development impact fees. "[T]he rational nexus test is a cost accounting approach that requires local governments to vigorously analyze the impact of new development on public facilities, and then to balance the government's revenue needs against the cost concerns of the development industry." Stroud, *supra* note 147, at 30. Prior to *Nollan*, California utilized a rational basis test under which any state interest would be enforced through regulations that were loosely constructed and did not directly advance the purported interest.

regulation to stand. Although the permit requirement did further an important and valid state interest, requiring the easement dedication of an individual private property owner who would continue to use the property in the same manner as it had been used previously, with no increased population or structural density on the site, seems unreasonable.

Despite the fears expressed by commentators, in actuality these decisions only tell public planning agencies to watch their step and to avoid overreaching, overbroad practices in their quest to regulate local policies. Planners must specifically tailor both the statutory requirements to further community needs and the means necessary to achieve the desired goal. The Court fears that overreaching practices seek "avoidance of the compensation requirement, rather than the stated police power objective."¹⁴⁹

Given the Court's deference to regulations that bear a rational relationship to an asserted legitimate state purpose,¹⁵⁰ the decisions in *Keystone*, *First English*, and *Nollan* reinforce the Court's unwillingness to become a super zoning appeal board. Regulations phrased in terms of legitimate public purposes, which provide specific means to advance that purpose directly, will withstand any court's scrutiny. In cases where the restricted property owner presents convincing evidence that a restriction is arbitrary and unreasonable, the burden will shift to the state to prove the existence of a legitimate interest and the appropriateness of the restriction to further it.

Specifically, in *Nollan* the Court said that the Coastal Commission's justification for its requirement was simply its belief about what would benefit the public. The Court concluded that the Commission was free to implement its policy, but to do so it must use eminent domain and compensation because no rational relationship existed between the asserted state purpose and the restriction imposed. Succinctly, "if it wants an easement across the Nollans' property, it must pay for it."¹⁵¹

The dissenting Justices in *First English* expressed a concern for the policy implications of that decision. "Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damage action."¹⁵² The Justices further feared that regulation reflecting valid public health and safety concerns would not be enacted when needed because of the unpredictable nature of takings analysis. This concern may be quieted by the Court's concern for a legitimate public purpose and its deference to the local legislative body when such a purpose is shown. Again, ensuring that the regulation effectuates public health, safety, and welfare concerns and that those concerns in fact exist will preclude judgments overturning local regulations.

B. Realities

Although the fears of Supreme Court Justices, judges, and commentators that these decisions will have an adverse influence on land-use planning in the future

149. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3150 (1987) (Brennan, J., dissenting).

150. See Justice Scalia's discussion of the differences between due process and equal protection claims in *Nollan*, 107 S. Ct. at 3147 n.3. See also *id.* at 3151-56 (Brennan, J., dissenting).

151. *Id.* at 3150.

152. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2399 (1987) (Stevens, J., dissenting).

merit consideration, the reality of the practices of planners and governmental agencies may limit the far-reaching effect of the decisions. Furthermore, in the future each decision may be interpreted narrowly, limited by its specific facts, and thus have a limited effect as actually applied by the courts.

Under *First English*, the regulation must first fail to further a legitimate substantial state interest and it must then deprive the owner of substantially all use and value in the property before a temporary regulatory taking will be recognized. Under *Nollan*, a close relationship must exist between the restriction, the proposed use, and the state goal. While *Nollan* could be applied to large-scale developments, it is more likely that its impact will be felt only in cases dealing with individual private property owners challenging a regulation that advances a weak state interest. In the case of corporate development of large tracts of land, the needs perceived by the state and articulated in the regulations will usually be more easily justifiable as new development imposes new demands on the environment and existing municipal infrastructure. Redevelopment of large tracts presents the same concerns. Regulations conditioning any large-scale development may easily be drafted in terms of legitimate public concerns about the effect of the development on the character of the existing neighborhood and available municipal services.

Similarly, under the *Keystone* analysis, a valid public purpose must be found by the legislature and the statute enacted must substantially further that purpose. Given the presumption of legislative validity afforded state governments by the Supreme Court, future cases brought under the *Keystone* rationale will be difficult for the parties challenging the regulation to sustain.

The net effect of the decisions is to protect the individual private property owner's rights through a strengthening of the fifth amendment takings clause. California state court decisions preceding *Nollan*, which involved the Coastal Commission and its permit requirements, reveal the power of the state agency and the relative helplessness of the individual homeowner.¹⁵³ The holdings of all three decisions are a fair application of the fifth amendment takings clause and show the sensitivity the Court must demonstrate toward public concerns and private interests in effective takings analysis.

V. CONCLUSION

Takings jurisprudence is an area of changing emphasis and uncertainty reflecting elements of current social, political, and economic concerns.¹⁵⁴ The Court recognizes the difficulty surrounding the takings question. This is one reason it has addressed the

153. See *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (condition requiring public easement across two-thirds of beachfront property upheld as prerequisite for building permit to construct single family home); *Remmenga v. California Coastal Comm'n*, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628, *appeal dismissed*, 474 U.S. 915 (1985) (condition requiring public easement across beachfront upheld as prerequisite for building seawall to protect property from ocean damage). See generally Tabor, *The California Coastal Commission and Regulatory Takings*, 17 PAC. L.J. 863 (1986); Comment, *Public Access and the California Coastal Commission: A Question of Overreaching*, 21 SANTA CLARA L. REV. 395 (1981).

154. One commentator suggested that there should be a touchstone for takings that does not vary with political and economic policy. See Bender, *supra* note 11.

issue sporadically, avoided it when possible, left its resolution and definition to the state courts, and articulated varying tests and concerns for its definition. The decisions in *Keystone*, *First English*, and *Nollan* reflect the Court's concern that the police power not be used in an inappropriate manner, that valid public purposes form the basis for exercises of eminent domain and police power, and that government act carefully and thoughtfully in enacting regulations that deprive property owners of the use and value of their property.

The Supreme Court did not produce a new and precise definition of a taking hoped for by commentators and practitioners. But neither are these decisions radical departures from past holdings. Each advances takings theory using traditional takings analysis, and each is consonant with the circumstances. *Nollan* reasserts the required nexus between the state interest and the terms of the regulation designed to achieve that interest. *Nollan* further emphasizes the differences between equal protection and due process analysis and holds that takings issues must be analyzed under due process concerns; regulations challenged as a taking require more than a rational basis to be valid. Although *Keystone* appears to contradict *Pennsylvania Coal*, it actually continues the evolution of takings analysis that began in *Pennsylvania Coal* and culminated in *Penn Central Transportation Co. v. New York City*.

First English also culminates one aspect of takings analysis that eluded the Court for years—whether a remedy other than invalidation of the regulation is available to recompense the affected property owner when a temporary regulatory taking is found. The recognition of a compensable temporary regulatory taking is potentially the most far-reaching of the decisions and opens a new area for takings challenges. However, its impact awaits courts' clarification of the holding as to what is necessary before a temporary regulatory taking will be found. The Court itself limited the holding to the facts before it and did not “deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like”¹⁵⁵ Even more than long-range planning guidelines, these areas could cause devastating financial problems to communities.

Perhaps one day the Court will discuss the takings question thoroughly and consider the roles of each of the many factors it has established for guiding takings analysis, set parameters for valuation of appropriated property interests, and state clearly the standard under which takings challenges will be reviewed. Until that time, however, the takings issue will continue to be addressed in light of the particular scenario before the courts, and ultimate holdings will be far from predictable.

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155. *First English*, 107 S. Ct. at 2389.

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